IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1334

DON BORDENKIRCHER, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY, PETITIONER

v.

PAUL LEWIS HAYES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE OFFICE OF THE CALIFORNIA STATE PUBLIC DEFENDER, THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION, AND THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

Paul N. Halvonik
Charles M. Sevilla
California State Public Defender
107 South Broadway, Suite 9111
Los Angeles, California 90012
(213) 620-5405

Ephraim Margolin
California Attorneys for
Criminal Justice
445 Sutter Street, Suite 501
San Francisco, California

Sheldon Portman
California Public Defenders Assn.
111 North Market Street
San Jose, California

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Criminal Justice
445 Sutter Street, Suite 501
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STATEMENT OF INTEREST OF AMICI CURIAE

The Office of State Public Defender is a new state agency which began operation on July 1, 1976, and which has been assigned by the Legislature with the general functions of representation of criminally accused and incarcerated indigents on appeal (Cal. Gov. Code §§ 15421; 15423), in criminal trials and in administrative hearings while they are incarcerated (Cal. Gov. Code §§ 15421; 15423). The State Public Defender is also authorized to appear amicus curiae and had appeared as such in the Supreme Court of California. During the ordinary course of its work, the office has become deeply involved in matters concerning plea bargains as many appeals, and inevitably every case awaiting trial, involve the propriety of a negotiated resolution of the litigation. California state and federal courts have adopted the rationale of then Judge (now Solicitor General of the United States) McCree in the case below. The State Public Defender seeks to insure that the rationale and result are preserved and promulgated nationally.

The California Public Defenders Association is a non-profit corporation incorporated under the laws of the State of California in 1969. The purpose of the association is to assist all public defender offices in California, whether state or federal, in their ongoing efforts to provide effective representation for indigent defendants. In this regard, the association is vitally concerned with any

action which might have a substantial impact upon the rights of indigents and upon the ability of defense attorneys to protect these rights. The right to a jury trial, a voluntary plea of guilty, and the control of prosecutorial charging abuses are involved in the case at bar. A decision sanctioning the conduct of the prosecutor below would have a deleterious impact on justice in this nation.

The California Attorneys for Criminal Justice (CACJ) is the largest association (1300 members) of its kind in the United States. The purpose of CACJ is to provide opportunities for criminal defense lawyers in California to meet and share ideas and information in connection with improvement of the criminal justice system in order to more effectively represent the accused. The members of CACJ have a common desire to see that the prosecutorial extortion in this case is not given the imprimatur of the United States Supreme Court.

Amici are in agreement that a reversal of the decision of the court below would have disastrous and destructive impact on the Fifth and Sixth Amendment rights of the criminally accused, on the ability of defense attorneys to effectively represent their interests, and provide an unfair and unconstitutional advantage to the prosecutors in state and federal criminal prosecutions.

Amici fully agree with the position of the respondent that the order of the trial court at issue here was improper and that the decision of the Court of Appeals was

correct. This brief is submitted in support of that judgment.

SUMMARY OF ARGUMENT

Plea bargaining in this nation, once thought corrupt and immoral (see note, "The Legitimation of Plea Bargaining: Remedies for Broken Promises," 11 Am. Crim. L.Rev. 771, n. 4 (1973) [hereinafter cited as "Legitimation of Plea Bargaining"], today has evolved to the status of necessary evil. However, the threat by the prosecutor in this case demonstrates why the concept of negotiated pleas of guilty has been shrouded in darkness and demands judicial scrutiny. Unregulated plea bargaining grants unchecked power to one side which, unrestrained, uses its powers to achieve desired ends by available means. "Bargains" under such circumstances become contracts of adhesion where the prosecution is able to use its available might to threaten and coerce defendants into pleas of guilty. If unsuccessful in his threats, the prosecutor may then punish with vengeance those who refuse to be compliant.

This court's decisions sanctioning plea bargaining recognize that the authority sought by petitioner (to threaten a defendant with a life sentence under a habitual offender enhancement statute in order to coerce a plea of guilty to the only charge then existing) cannot be constitutionally given. See Santobello v. New York, 404 U.S. 257 (1971); United States v. Jackson, 390 U.S. 570 (1968). To do so would sanction a practice of prosecutorial extortion, unconstitutionally discourage a

defendant's right to a jury trial, and blacken the appearance of justice in this nation.

The undisputed explanation for what took place in this case is that the respondent was reindicted with a habitual offender enhancement because he was audacious enough to assert his constitutional right to jury trial on a forgery charge rather than to accept a plea bargained five-year sentence. When the prosecution of a criminal case descends to such a level where, because of a defendant's stubborn insistence on putting the government to its proof at a jury trial the "ante is upped," due process of law is subverted. The reindictment in this case is as improper as the enhancement of sentence following a successful appellate attack and reversal in North Carolina v. Pearce, 395 U.S. 711 (1969), or reindicting for a felony violation a defendant who had been convicted of a misdemeanor and exercised his right to a trial de novo by appeal of the misdemeanor conviction (Blackledge v. Perry, 417 U.S. 21 (1974)). In Blackledge, this court considered the necessity for adopting a prophylactic procedural rule to bar vindictive prosecutors from punishing defendants from asserting constitutional rights:

> "The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the Pearce case. We conclude that the answer must be in the affirmative.
>
> "A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formally convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals--by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy--the State can ensure that only the most hearty defendants will brave the hazards of a de novo trial." (Id. at 417 U.S. 21, 27).

Just as in Blackledge and Pearce, here the prosecutor clearly has a considerable stake in discouraging defendants who refuse to plead guilty to an existing indictment from asserting their right to jury trials. Trial, as opposed to pleas, clearly requires increased expenditures of prosecutorial resources and may perhaps result in a defendant going free by an acquittal. Since a prosecutor has the means readily at hand to discourage such a right to trial by "upping the ante" whenever the insistent defendant continues to assert his right to jury trial, the prosecution can insure that only the most hearty defendants will brave the very real

hazardous consequences of jury trial.

The arguments of justification by petitioner and amicus (State of Texas) overstate the holding of the court below and ignore the crucial elements involved in a case such as the timing of the threat and the nature of the change. Here, the prosecution initially opted for the less severe forgery count, and was free of any legal restraint on the bringing of the harsher charge. Thus, the decision not to proceed on the enhancement -- the habitual offender statute -- was explicable only in terms of a knowing and rational rejection of that alternative as an inappropriate characterization of the defendant's conduct and background. When the indictment with the enhancement was later returned, the only intervening events were respondent's demand to go to trial and refusal to plead guilty to the forgery charge.

These events are not a proper basis for reindictment. Even if not prompted by actual vindictiveness, such action at least has that appearance and warrants judicial intervention to determine the grounds of the decision to aggravate the charge, and whether it will be permitted.

ARGUMENT

I

POST-INDICTMENT PROSECUTORIAL THREATS TO A DEFENDANT TO "UP THE ANTE" UNLESS A GUILTY PLEA IS FORTHCOMING CONSTITUTES EXTORTION WHICH PENALIZES THE EXERCISE OF THE RIGHT TO JURY TRIAL AND DENIGRATES THE APPEARANCE OF JUSTICE.

It is as important to define what is not involved in this case as it is to define the issue. The court below and respondent do not question the prosecutor's authority to bring felony charges against respondent in the first instance, nor do they question the prosecutor's discretion in initially choosing which charges to bring against respondent. The issue in this case is not nearly as broad as petitioner stretches it. The question is simply whether a prosecutor, after initially making a rational decision to indict on a specific charge, may reindict on charges far more aggravated only because the accused has exercised his constitutional right to trial by jury on the original indictment. Amici submit that the answer to this question is a resounding no.

A. The Decisions of this Court Upholding Plea Bargaining Do Not Grant the Prosecution Unlimited Power in Securing Plea Agreements.

In upholding the constitutionality of plea bargaining, this court noted that the many reasons supporting plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor."

Santobello v. New York, 404 U.S. 257, 261 (1971). This court recognized that "the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances" (Id. at 262). The necessity for judicial supervision over the plea bargaining process is made apparent by the instant case and the serious stakes involved. Prosecutorial threats to enhance charges absent a guilty plea to the original indictment place a huge price on a defendant's exercise of his right to jury trial, to confront his accusers, to present witnesses in his defense, to remain silent, and to be convicted by proof beyond a reasonable doubt.

The decision of the court below is a natural and logical interpretation of this court's decisions in the area of guilty pleas and plea bargaining. In Machibroda v. United States, 368 U.S. 487 (1962), this court held that a habeas corpus petitioner made a cognizable allegation under 28 U.S.C. section 2255 in alleging that the prosecutor had made ex parte promises to the defendant-petitioner for an agreed-upon sentence. The prosecutor allegedly threatened the defendant-petitioner with two other robbery counts if the defendant "insisted in making a scene." This court held that a hearing would be necessary to resolve the allegations because a guilty plea "if induced by promises or threats which deprive it of the character of a voluntary act, is void" (Id. at 493).

In United States v. Jackson, 390 U.S.

570 (1968), this court struck down a provision of the Federal Kidnapping Act which made the offense punishable by death if the verdict of the jury so recommended. No death penalty could be obtained by court trial. This court held that the provision was invalid as imposing an impermissible burden on a defendant's exercise of his Fifth Amendment right not to plead guilty and his Sixth Amendment right to demand trial by jury.

In 1970, this court announced the famous guilty plea trilogy of cases, Brady v. United States, 397 U.S. 742; McMann v. Richardson, 397 U.S. 759; Parker v. North Carolina, 397 U.S. 790. Brady upheld the voluntariness of a plea to a violation of the Federal Kidnapping Act. The court reserved ruling on a "situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." 397 U.S. 751 n.8. The court concluded its opinion in Brady with the following pertinent language:

> "We would have serious doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves." (Id. at 758).

The court expressed its confidence in Brady that trial courts would satisfy themselves that pleas of guilty were made voluntarily.

Threats of harsh treatment by a prosecutor made to induce guilty pleas unfairly burden and intrude upon a defendant's decision-making ability. Compare Garrity v. New Jersey, 385 U.S. 493 (1967) (the surrender of the self-incrimination privilege is involuntary when an individual is presented by the government with the choice of discharge from employment if the privilege is invoked).

In sum, the decisions of this court in the realm of plea bargaining have upheld the procedure. In doing so, the court has made it clear that there will be judicial supervision of the process in order to insure basic fairness on the part of the prosecutor. When these rulings are combined with this court's pronouncements in North Carolina v. Pearce, 395 U.S. 711 (1969), and Blackledge v. Perry, 417 U.S. 21 (1974), it is clear that the actions of the prosecutor below are in violation of due process of law.

B. Under Blackledge v. Perry, and North Carolina v. Pearce, Vindictive Indictments Are Constitutionally Impermissible.

In North Carolina v. Pearce, supra, this court considered the constitutional problems presented when, following a successful appeal and reconviction, a defendant is subjected to greater punishment than that imposed at the first trial. This court held that the invocation of a harsher penalty at the second trial against a defendant merely because the latter successfully pursued his statutory

right of appeal is a violation of due process of law (395 U.S.711,724). The court held that an enhanced sentence after a second trial was permissible only where the sentencing judge placed certain specified findings on the record. This prophylactic rule was necessary to insure that defendants were not punished for exercising procedural rights.

In Blackledge v. Perry, supra, this court focused on a "realistic likelihood of 'vindictiveness'" of the prosecutor (417 U.S.21, 27). The court went on to hold "that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo" (417 U.S. 21, 28-29).

The doctrine that flows from Pearce and Perry is simply that a prosecutor may not vindictively punish a defendant solely because the latter has chosen to exercise a constitutional or statutory right. The majority of cases dealing with the issue have so ruled. See United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977); Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976), cert. granted 6 June 1977 (this case); United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974); United States v. Jamison, 505 F.2d 407 (1974); Sefcheck v. Brewer, 301 F.Supp. 793 (S.D. Iowa, E.D. 1969); In re David B., 68 Cal.App.3d 931 (1977); and compare United States v. Preciado-Gomez, 529 F.2d 935 (9th Cir. 1976).

The brief for petitioner cites no cases upholding the constitutionality of such prosecutorial conduct. The State of Texas, as amicus curiae, relies on this court's holding in Oyler v. Boles, 368 U.S. 448 (1962). There, this court simply held that there was no denial of equal protection of the laws upon a record which only demonstrated that not every eligible candidate was charged as a habitual criminal offender. "Hence the allegations set out no more than a failure to prosecute others because of a lack of knowledge of their prior offenses. This does not deny equal protection. . . ." (id. at 456). Texas also cites Martinez v. Estelle, 527 F.2d 1330 (5th Cir. 1976), wherein the defendant was indicted for possession of heroin with two prior felony convictions also alleged. In return for waiving his right to trial by jury, the prosecution agreed to drop the habitual offender enhancements (the two felony count allegations). After conviction, the defendant appealed and was granted a new trial. The second indictment was identical to the first, but the defendant refused a similar offer in return for a jury waiver. Upon conviction of the substantive offense and the enhancement, the defendant appealed claiming vindictive prosecution.

Because there was no retaliatory state response as exemplified by aggravated charges, the defendant's charge was meritless. The case is thus patently distinguishable from the instant one in that there was no change of prosecutorial position in reaction to the defendant's assertion of his right to trial. The same

analysis pertains to Arechiga v. Texas, 469 F.2d 646 (5th Cir. 1972), relied upon by Texas. 1

Interestingly, the Fifth Circuit in Colon v. Hendry, 408 F.2d 864 (5th Cir. 1969), held impermissible an increase in charges against the defendant which were brought in retaliation for the latter's seeking federal habeas corpus relief. Citing United States v. Jackson, supra, for the illegality of needlessly penalizing one for asserting a constitutional right, the court recognized that the defendant's position had been substantially worsened simply because he exercised his constitutional right: "Here there has been no retrial; only a charge of more gravity: a felony as distinguished from a

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1 In re Breen's Petition, 237 F.Supp. 575 (S.D. Tex. 1964), cited by Texas is a holding identical to that of Oyler v. Boles, supra, and thus adds nothing to the position in support of the petitioner.

misdemeanor. Although there has been as yet no retrial and no sentence, it cannot be said that the plight of petitioner has not substantially worsened" (408 F.2d 864,866).

C. Petitioner Overstates the Holding and Impact of the Decision of the Court Below.

Petitioner characterizes the decision of the court below as holding "that a prosecutor may not constitutionally seek an additional indictment, specifically under an enhancement statute, if an accused chooses to stand trial rather than plead guilty to an offer made by the prosecutor on the original charge" (Brief for Pet. 16). The petitioner continues that this decision "erodes prosecutors' use of their plea bargaining leverage. . . ." (id. at 19), and that "the role of plea bargaining as an effective tool on the administration of justice will have been significantly diminished" (id. at 20).

The holding of the court below, of course, neither contains the broad ruling suggested, nor has the disastrous impact hypothesized. The holding is grounded in the assumption that the initial charging decision by a prosecutor is an honest assessment of the charges upon which a defendant should be indicted. See the American Bar Association, Standards Relating to the Prosecution Function, section 3.9 (Approved Draft 1968). Although the petitioner evidently embraces the concept that prosecutors may "attempt to structure a criminal case so that a defendant will

choose not to go to trial" (Brief for Pet. 12), this practice of overcharging is to be condemned. See Bennett, "An Offer You Can't Refuse! The Current Status of Plea Bargaining in California," 7 Pac. L.J. 80, 101 (1976). Here, the prosecution was fully aware of petitioner's record, but made a rational choice in electing not to use the enhancement because of the non-aggravated nature and paucity of respondent's previous transgressions of the law. The Watergate Special Prosecutor, in a recent brief to this court, summarized the proposition as follows:

> "Where the prosecution has the discretion to prosecute certain criminal conduct with varying degrees of severity and initially opts for the less severe charge, there is a tacit assumption that the decision so to proceed was sound and rational and encompassed a rejection of the more severe alternative. A subsequent substitution of the more severe charge, based on the same facts, makes the motives of the prosecution presumptively suspect." [Citation to Hayes v. Cowan.] 2

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2 Petition for a writ of certiorari, United States v. DeMarco, p.12 (May 1977). The position of the Watergate Special Prosecutor combined with that of Judge (now Solicotor General) McCree in his opinion below, indicates that in this case federal prosecutors recognize the gross impropriety of such prosecutorial action.

Thus, the prosecution in the instant case was free to charge petitioner originally with the enhancement. The decision not to do so may only be explained as a knowing and rational acceptance of the forgery count as an appropriate characterization of the defendant's conduct and background. When the enhancement indictment was brought after the failure of plea bargaining and the accompanying prosecutorial threats, the only intervening event was the respondent's assertion of his constitutional right to proceed to trial. It is only in this context of prosecution retaliation for a defendant's election to proceed with a constitutional, statutory or procedural right, that the need for proscription arises. This case in no way interferes with a prosecutor's determination of whether to charge and what to charge. It will not invade the province of the prosecutor in choosing to accept pleas to selected counts, lesser included offenses, for recommendations as to sentence, to reduce charges, dismissal of other charges, or potential charges against a defendant. Indeed, assuming a proper validation for increased charges after plea bargaining, there may be no proscription against a reindictment for additional charges. See Blackledge v. Perry, supra, at 29 (n. 7: "This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in Diaz v. United States, 223 U.S. 442. . . .") In order to remove the suspect nature of such action, however, "the reasons for such increases, as well as the factual bases, must be made

a part of the record at the time the higher indictment is filed with the court." United States v. Jamison, supra at 416. Examples of such situations are where a victim dies after the first indictment, or where new evidence of which the government was excusably unaware is discovered. A proper showing would demonstrate that the added charges are brought for proper reasons and not as punitive retaliation against a defendant who exercises his right to trial.

II

PETITIONER'S REQUEST FOR UNBRIDLED DISCRETION IN PROSECUTORIAL CHARGING POWER AND PLEA BARGAINING AUTHORITY MUST BE RESOLUTELY REJECTED BY THIS COURT.

When the facts of this case are put into their proper perspective, they demonstrate an unconscionable activity on the part of the prosecutor who, in an effort to prevent respondent from asserting his constitutional right to trial by jury, threatened to "up the ante" from a maximum of ten years on the original indictment to that of life imprisonment on the subsequent indictment. Respondent's only action which warranted the reindictment was his "unreasonable" choice to stand trial (see Brief for Pet. 15-16). Petitioner contends that the Pearce-Perry holdings are inapposite because they involve retaliatory actions by a court or prosecutor after an attempt by a defendant to exercise a right. Here, so the argument goes, "there exists no right to be bargained with by the prosecutor for a plea of guilty" (Brief for Pet. 18). However, respondent had a right to go to trial unthreatened by charges the prosecution believed originally inappropriate to bring. Thus, petitioner misses the crucial point as typified by the following:

> "The end result of the procedure used by the prosecutor in this case was no more vindictive so as to impose an impermissible burden upon the assertion of trial rights than is the frequent situation where a

> prosecutor indicts on a principal charge and also under an enhancement statute and then bargains for a plea of guilty to the principal charge on the promise the prosecutor will make a motion to drop the habitual criminal charge. The difference between the leverage and impact involved in the present case and that in the procedure noted above is non-existent " (Id. at 20-21).

The missing element in the above analysis is that in this case, the prosecution made a reasoned, discretionary judgment that the respondent was not a fit candidate for the habitual criminal charge although he technically came within its ambit. To thereafter threaten the enhancement as a means to coerce a guilty plea is the type of manipulative tool which no ethical prosecutor needs or should desire. 3

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3 The common problem of vertical and horizontal prosecutorial overcharging whereby charges are puffed to induce guilty pleas to lesser charges, must await court scrutiny another day. See generally "The Legitimation of Plea Bargaining," supra; Alschuler, "The Prosecutor's Role in Plea Bargaining," 36 U.Chi.L.Rev. 50 (1968).

Petitioner requests this court to view this case from the prospective of respondent's having pled guilty to the forgery charge under the plea bargain. "Clearly" says petitioner, "this would be found to be constitutionally permissible" (Brief for Pet. 23). The best answer to this hypothetical question is found in United States v. Jackson, 390 U.S. 570,583, where this court stated:

> "It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right. Thus the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." [Emphasis in original].

Thus, the fact that respondent might have chosen to have pled guilty is irrelevant to the analysis of the problem, "for the evil to which Pearce is directed is the apprehension on the defendant's part

of receiving a vindictively imposed penalty for the assertion of rights" United States v. Jamison, 505 F.2d 407, 415. Here, the sole motivation of the prosecutor was to coerce a plea of guilty out of respondent. That this is a violation of constitutional rights is apparent for "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional." United States v. Jackson, supra at 581. The petitioner's efforts to obtain this court's imprimatur on such conduct should be firmly rejected.

CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, amici respectfully submit that this court affirm the decision of the Court of Appeals.

Charles M. Sevilla, Chief
Assistant State Public
Defender
107 South Broadway,
Suite 9111
Los Angeles, California 90012

For the Amici

Paul N. Halvonik
State Public Defender
Charles M. Sevilla, Chief Assistant
State Public Defender

Sheldon Portman, Chairman
California Public Defenders
Association
Santa Clara County Public Defender
111 North Market Street
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Ephraim Margolin
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445 Sutter Street, Suite 501
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